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October 20, 2008

Chief Judge Richard L. Sippel  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: Herring Broadcasting Inc., d/b/a WealthTV v. Bright House Networks LLC  
FCC File No.CSR-7822-P  
Request for Modification and Clarification HDO or, In the Alternative, For  
Certification of Application for Review**

Dear Chief Judge Sippel<sup>1</sup>:

Bright House Networks, LLC ("BHN"), by its attorneys and pursuant to Section 1.229(b)(3) of the Commission's rules, 47 C.F.R. § 1.229(b)(3), hereby moves for a modification and clarification of the Hearing Designation Order ("HDO")<sup>2</sup> adopted by the Media Bureau ("Bureau") in the above-referenced program carriage complaint proceeding. In the event that the Administrative Law Judge ("ALJ") determines that he is without authority to consider, in whole or in part, the requested modification and clarification, BHN respectfully requests that the affected questions presented be certified to the Commission for review pursuant to Section 1.115(e)(3) of the rules, 47 C.F.R. § 1.115(e)(3).

In the HDO, the Bureau concluded that Complainant Herring Broadcasting Inc., d/b/a WealthTV ("WealthTV") had established a *prima facie* showing that BHN has discriminated against WealthTV in violation of the Commission's program carriage rules and ordered WealthTV's complaint designated for hearing before an ALJ.<sup>3</sup> As modified

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<sup>1</sup> As of the time of filing, the Commission had not given public notice of the designation of a presiding officer for the instant proceeding. Consequently, BHN is directing this request for relief to the Chief Administrative Law Judge. BHN suggests that its request be held in abeyance until such time as a presiding officer is designated and the parties have had the opportunity to discuss the issues raised herein at a pre-hearing conference called at the earliest convenience of the presiding officer.

<sup>2</sup> *Memorandum Opinion and Hearing Designation Order ("HDO")*, DA 08-2269 (MB, rel. Oct. 10, 2008), modified by *Erratum* (MB, rel. Oct. 15, 2008).

<sup>3</sup> *Id.* at ¶¶ 35, 126. In addition to designating WealthTV's complaint against BHN for hearing, the HDO also separately designates for hearing five other program access complaints (including three others filed by WealthTV). BHN is not a party to any of these other proceedings.

by a subsequent Erratum, the HDO identifies the following issues referred to an ALJ for a “recommended determination”:

- (a) whether the defendant has discriminated against the complainant’s programming in favor of its own programming, with the effect of unreasonably restraining the complainant’s ability to compete fairly in violation of Section 76.1301(c);
- (b) if the Administrative Law Judge determines that the defendant has discriminated against complainant’s programming in violation of Section 76.1301(c), the appropriate price, terms and conditions on which the complainant’s programming should be carried on defendant’s systems and such other remedies as the Administrative Law Judge recommends.<sup>4</sup>

The HDO further states that the ALJ, within 60 days of the HDO, is to “resolve all factual disputes and submit a recommended decision and remedy, if appropriate.”<sup>5</sup>

First, BHN notes that while the issues as designated in the HDO refer to Section 76.1301(c)(3) of the Commission’s rules, the wording of the issues does not reflect the wording of the Commission’s rules or Section 616(a)(3), the underlying statutory provision.<sup>6</sup> BHN thereby requests that, to minimize the risk of confusion or delay, the ALJ modify the issues to more closely track the language of Section 76.1301 as follows:

- (a) whether the defendant engaged in conduct the effect of which is to unreasonably restrain the ability of the complainant to compete fairly by discriminating in video programming distribution on the basis of complainant’s affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by complainant in violation of Section 76.1301(c);
- (b) if the Administrative Law Judge determines that the defendant has discriminated against the complainant’s programming in violation of Section 76.1301(c), whether mandatory carriage of complainant’s programming by BHN is necessary to remedy the violation and, if so, the prices, terms, and conditions of such carriage and such other appropriate remedies as the Administrative Law Judge recommends.

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<sup>4</sup> *Erratum* at ¶ 6 (modifying Paragraph 126 of the HDO).

<sup>5</sup> HDO at ¶ 128. While Paragraph 128 of the HDO directs the ALJ to “submit a recommended decision,” Paragraph 126 (as modified by the October 15, 2008 *Erratum*), directs the ALJ to conduct a hearing “for a recommended determination.” BHN assumes that the use of the different terms “decision” and “determination” in these two paragraphs of the HDO was not intended to affect any party’s substantive rights, *e.g.*, the right under Section 1.276 to file exceptions to any “initial decision.” BHN requests that the ALJ confirm our understanding on this point or, in the alternative, certify an Application for Review on this question in accordance with Section 1.115(e)(3).

<sup>6</sup> *See* 47 U.S.C. § 536(a)(3).

Second, BHN also requests that the ALJ confirm that the Bureau's conclusion that WealthTV has met its *prima facie* case burden does not in any way bind the ALJ with respect to any of the legal or factual issues presented by WealthTV's complaint. A *prima facie* showing means only that a party has presented allegation that, if proven true, could support a finding of a violation of Section 76.1301(c).<sup>7</sup> It remains incumbent on the ALJ to consider and decide on a *de novo* basis both the underlying legal issues and "all factual disputes" material to the resolution of those issues.<sup>8</sup> Fundamental fairness and due process demands that parties be afforded a full opportunity to test WealthTV's allegations and inferences, many of which are nothing more than bald and undocumented assertions, in the crucible of an administrative hearing.<sup>9</sup>

Third, as indicated above, the HDO states that, within 60 days of the HDO's release (*i.e.*, October 10, 2008), all factual disputes must be resolved, and decisions must be submitted to the Commission, in each of the six separate cases addressed in the HDO. This deadline simply is not realistic. Even focusing solely on the four cases brought by WealthTV, each complaint is based on a separate course of conduct and a separate set of inferences.<sup>10</sup> And each case will require its own scheduling for the various steps that are necessary in a hearing proceeding, such as document discovery, interrogatories, depositions, evidentiary motions and rulings, the trial itself and post-trial briefs, and the writing of a decision by the ALJ. These are complex cases, as is reflected by the fact that it took the Bureau nearly seven months to determine whether WealthTV's complaint stated a *prima facie* case against BHN and a significant portion of the time allotted by the HDO already has expired before even the first steps towards setting a schedule have been taken.

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<sup>7</sup> BHN strongly disagrees with the Bureau's conclusion that WealthTV has made out a *prima facie* case that BHN engaged in a course of conduct *vis-à-vis* WealthTV that was based on affiliation or non-affiliation and that harmed WealthTV's ability to compete fairly. BHN believes that the HDO is unsupported by the record, is based on an incorrect interpretation and application of Section 76.1301(c) and the underlying statutory provision, is inconsistent with BHN's First Amendment and other constitutional rights, and is otherwise arbitrary, capricious, and contrary to law. BHN understands that, under the Commission's rules, it will have an opportunity to fully challenge the HDO in its post-hearing Findings of Fact and Conclusions of Law, and that the ALJ's determination on these matters will be subject to review by the full Commission and, ultimately, by the courts. See 47 C.F.R. § 1.115(e) (3). If BHN's understanding in this regard is incorrect and it is required to file an Application for Review prior to the hearing in order to fully preserve its right to challenge the HDO, BHN requests certification pursuant to the procedures set forth in Section 1.115(e)(3) so that it may file such an Application for Review.

<sup>8</sup> The factual disputes to be resolved include those arising from the responses to WealthTV's complaint in BHN's answer as well as those arising from other documentary or testimonial evidence presented during the hearing.

<sup>9</sup> The Commission's rulemaking order implementing Section 616 of the Communications Act, as amended, clearly indicated that in the majority of instances where a complainant has established a *prima facie* case, disposition of the complaint will require discovery and an administrative hearing to resolve factual disputes. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642, 2655-56 (1994) ("Program Carriage Rulemaking Order").

<sup>10</sup> *Program Carriage Rulemaking Order*, *supra*, 9 FCC Rcd at 2655, note 52.

The Commission's rules confer on an ALJ broad authority to regulate the course of a hearing<sup>11</sup> and to modify the hearing schedule upon good cause shown, unless the time for performance of a particular act is limited by statute.<sup>12</sup> Congress has not imposed any statutory deadlines on the resolution of program carriage complaints and the Commission, in 1993, expressly rejected a proposal that it adopt a 90-day deadline for the resolution of a such a complaint, finding that such a proposal was not "practicable or advisable" in light of "the complexity of the issues that may be raised in [program carriage disputes]."

Given that neither Congress nor the Commission have delegated to the Bureau the authority to bind an ALJ, in advance, to a specific deadline for completing action on a case, and given the complexity of the issues presented and volume of evidence likely to be presented, BHN submits that fundamental considerations of due process require that the ALJ should adopt a proposed hearing schedule that is designed to serve interests of justice rather to meet an artificial deadline.<sup>13</sup>

Finally, to the extent that the ALJ concludes that the HDO does not allow it to consider *de novo* all material legal and factual questions relevant to deciding whether BHN has violated Section 76.1301(c) or to establishing an appropriate remedy for any such violation, BHN respectfully requests that the question of the scope of the ALJ's role under the HDO be certified to the Commission in accordance with Section 1.115(e)(3) of the Commission's rules. Certification is appropriate because such a ruling would present a controlling question of law as to which there is substantial ground for difference of opinion.<sup>14</sup> Moreover, immediate consideration of this question plainly would materially expedite the ultimate resolution of the instant proceeding, since a full exploration of the allegations in WealthTV's complaint would require a remand if an erroneous ruling on the scope of the ALJ's role resulted in a truncated hearing.<sup>15</sup>

Similarly, BHN requests certification of an Application for Review on the question of the ALJ's authority to manage the schedule of this hearing should the ALJ conclude that it is bound by the 60-day deadline specified in the HDO. Such certification is appropriate under Section 76.115(e)(3) because a ruling that the ALJ is bound by the Bureau's time deadline also presents a controlling question of law as to which there is

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<sup>11</sup> 47 C.F.R. § 1.243(f).

<sup>12</sup> 47 C.F.R. § 1.205.

<sup>13</sup> For example, WealthTV's case against BHN relies heavily on allegations regarding conversations between one or more BHN's employees and John Scaro, then WealthTV's Vice President of Affiliate Relations. As the HDO acknowledges, WealthTV has not submitted a sworn statement from Mr. Scaro, who apparently is no longer even an employee of WealthTV (and whose present whereabouts are unknown to BHN); instead, WealthTV (and the HDO) rely on hearsay declarations from WealthTV's President and its Chairman to support those allegations. BHN must be given the opportunity to seek additional discovery, including interrogatories and/or deposition testimony, with respect to Mr. Scaro's alleged communications with BHN.

<sup>14</sup> See 47 C.F.R. § 76.115 (e)(3).

<sup>15</sup> See *id.*

substantial ground for difference of opinion, immediate consideration of which would materially expedite the ultimate resolution of this proceeding.

For the reasons stated above, BHN respectfully requests that the ALJ adopt the clarifications and modifications to the HDO set forth herein or, in the alternative, certify an Application for Review on the questions presented.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Arthur J. Steinhauer', written in a cursive style.

Arthur J. Steinhauer  
Counsel to Bright House Networks, LLC

cc: Kathleen Wallman  
Kris Monteith  
Marlene H. Dortch

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